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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 JOE FASANO, *Individually and*  
4 *on Behalf of All Others*  
*Similarly Situated*, et al.,

5 Plaintiffs,

6 v.

16 CV 8759 (KPF)

7 GUOQING LI, et al.,

8 Defendants.

9 -----x

10 New York, N.Y.  
February 14, 2017  
3:00 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 SADIS & GOLDBERG

16 Attorneys for Plaintiffs

17 BY: DOUGLAS R. HIRSCH

BEN HUTMAN

SAMUEL J. LIEBERMAN

18 O'MELVENY & MYERS, LLP

19 Attorneys for Defendants

20 BY: ABBY F. RUDZIN

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(In open court; case called)

THE DEPUTY CLERK: Will counsel please identify yourselves for the record beginning with plaintiff.

MR. LIEBERMAN: Yes. For plaintiff, Sam Lieberman of Sadis & Goldberg, LLP.

THE COURT: Sir.

MR. HIRSCH: For plaintiff Douglas Hirsch of Sadis & Goldberg.

MR. HUTMAN: Ben Hutman of Sadis & Goldberg as well.

THE COURT: Which of you should I be directing my questions to, or do I get to pick?

MR. LIEBERMAN: You probably do get to pick, but we would appreciate if you would direct your questions to me, Judge Failla.

THE COURT: Thank you, sir.

Go ahead, please.

MS. RUDZIN: Good afternoon. Abby Rudzin of O'Melveny & Myers, LLP, for the corporate defendants.

THE COURT: Thank you. Good afternoon to you as well. This is a premotion conference in this case. It is also our initial conference.

Ms. Rudzin, may I please begin with you. Here is my question: As I read the PSLRA, it seems to me that the filing of the motion that you contemplate would stay discovery and it would stay proceedings in the case, including the selection of

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1 lead plaintiff and lead plaintiff's counsel.

2 Am I misreading the statute?

3 MS. RUDZIN: Your Honor, I actually haven't thought  
4 about that question. Discovery would be stayed, you Honor.  
5 You are not misleading that part; but in terms of whether you  
6 can appoint me lead counsel, defendants don't usually have a  
7 say in who is lead counsel. I am not well versed in those  
8 provisions.

9 THE COURT: Fair enough. I don't know that I am going  
10 to be able to persuade you not to bring your motion, but I am  
11 wondering if there would be an impact if I were to order it to  
12 be filed on a day before March 8th.

13 Mr. Lieberman, I will begin asking questions, unless  
14 you want to turn the mic over to Ms. Rudzin. I would like to  
15 know, sir, do you believe that the filing of this motion would  
16 require me to stay the selection of lead plaintiff and lead  
17 plaintiff's counsel?

18 MR. LIEBERMAN: No, it does not, your Honor. The  
19 filing of the motion to dismiss is meant to stay discovery.  
20 The history of the PSLRA was meant to stop suits, that  
21 defendants proceed to strike suits by making sure that a motion  
22 to dismiss adjudicates the merits. Procedurally a lead  
23 plaintiff needs to be appointed and lead counsel to act on  
24 behalf of the class. Even though it is before class  
25 certification, it gives the courts presumptive seal on who will

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1 represent the class through the motion to dismiss phase.

2 So I am not aware of any authority actually holding  
3 that it stops the lead plaintiff process at all.

4 THE COURT: Let me ask a followup question then, sir.  
5 As a practical matter it may will be the case that your clients  
6 are the lead plaintiffs and that you are lead plaintiffs  
7 counsel, but I don't know and I will not know until the 8th of  
8 March. Given that, I should I set up the briefing schedule if  
9 I schedule briefing on defendant's motion so that the -- you  
10 are the presumptive lead plaintiff counsel, but we don't know  
11 just yet. Should we wait to figure it out until we set up  
12 before we start setting up your response time?

13 MR. LIEBERMAN: Yes. Your Honor, raises a good point,  
14 which is that is a procedural matter. Lead plaintiff, lead  
15 counsel should be determined before the briefing. In this case  
16 to give some explanation as to why Ms. Rudzin and I started  
17 sending letters your way before that process was done, and I  
18 understand from your letter where you have indicated that that  
19 schedule remains in place, we had just happened to notice as a  
20 practical matter that because no one else had filed a motion  
21 for lead plaintiff that it did not appear that there was going  
22 to be a contest as to this issue and therefore I think as a  
23 matter of practicality in moving the case forward that is why  
24 the letters started. As a procedural matter, yes, the cart  
25 should not go before the horse. The Court does need to make a

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1 determination and that determination isn't necessarily one that  
2 will happen because no one else opposes. Although, we haven't  
3 seen anyone put anything in indicating a reason why our  
4 clients, who have over 400,000 shares involved in the matter,  
5 would have any issue being lead plaintiff. So I think all  
6 parties expect that the lead plaintiff, lead counsel are in the  
7 room and represented. However, your Honor raises a good point,  
8 which is that really does need to be decided first.

9 THE COURT: My point really is so much simpler than  
10 that, which is we have the proceeding on the 8th of March but  
11 if I require the response to be in later March that will be  
12 enough time for you if you are lead plaintiff's counsel and for  
13 someone else if they are to respond?

14 MR. LIEBERMAN: You are saying with respect on the  
15 motion to dismiss.

16 THE COURT: Yes, sir.

17 MR. LIEBERMAN: The Court's schedule of 45 days within  
18 submission of the motion that will not be an issue for you us.

19 THE COURT: All right.

20 (Continued on next page)

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1 MR. LIEBERMAN: So you're saying with respect to  
2 the -- on the motion to dismiss.

3 THE COURT: Yes, sir.

4 MR. LIEBERMAN: Yeah, the proposed schedule of 45 days  
5 from the submission of the motion, that would not be an issue  
6 for us.

7 THE COURT: All right. 45 days is a little much for  
8 me to handle but we'll work that out at some point. Let me  
9 turn back to Ms. Rudzin.

10 Ms. Rudzin, may I -- actually, I'm sorry. I'm going  
11 to go back to Mr. Lieberman for a moment.

12 Mr. Lieberman, in your complaint there are non federal  
13 claims. Do you agree?

14 MR. LIEBERMAN: That's true.

15 THE COURT: Are they under new York Law?

16 MR. LIEBERMAN: There is negligent misrepresentation  
17 claims under New York Law, yes. That's under New York Law.  
18 There are some claims for breaches of fiduciary duty which the  
19 choice of law may end up getting litigated.

20 THE COURT: Yes. And that's where I'm going with  
21 this. Why don't I ask the question more simply, are any of  
22 these claims going to be under law of the Cayman Islands?

23 MR. LIEBERMAN: That ultimately that's going to be for  
24 the Court to decide.

25 THE COURT: I understand, but should I be deciding

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1 that issue or you know where you're going with this. It is a  
2 factor to consider in assessing the viability of the forum of  
3 non convenience motion. So, I'm trying get a sense, if you  
4 know that you're going to be raising claims under Cayman  
5 Islands law, I just want to know. What would you be arguing to  
6 me? Would you be arguing that these other non federal claims  
7 are subject to New York Law or some other law?

8 MR. LIEBERMAN: Well, we will be arguing New York Law  
9 as to the negligent misrepresentation claims. We will also put  
10 forward reasons why we think New York Law could apply to the  
11 fiduciary duty claims. It is possible the Court will determine  
12 that because this was a Cayman registered company that does  
13 involve Cayman law as to the fiduciary duty claims.

14 What I'd say about that, your Honor, is this Court and  
15 many others have become very familiar with handling  
16 international law. There are issues where you have an expert  
17 that comes in. What we think is important in the U.S. interest  
18 is the U.S. securities law claim under Rule 1383 which is that  
19 there was a false statement made as to the independence of  
20 counsel.

21 And as Judge Cote noted in the Poseiden case that  
22 there is a strong U.S. interest in the enforcement of the U.S.  
23 securities laws here. Look, it would be great if every case  
24 involved just one application of law. But one issue that often  
25 comes up even if there is some determination that Cayman that

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1 could apply as opposed to New York as to certain others would  
2 be whether there would be any substantive differences between  
3 the two. There is Cayman authority out there that looks to the  
4 law in the United States as to how to handle cases addressing  
5 the fair value of a company. So, it remains to be seen whether  
6 there would be a significant difference as to those claims  
7 between U.S. law and Cayman law. But for us, what's prime for  
8 us is that, look, you have Mr. Fasano is a New York --

9 THE COURT: Slow down, please, sir.

10 MR. LIEBERMAN: Mr. Fasano is a New York resident.  
11 He's come to the courts in his home state with claims under  
12 U.S. law about the company that made a decision to list in the  
13 United States in New York at the New York Stock Exchange. And  
14 it didn't just do that it. Also chose in ADR depository, the  
15 Bank of New York which held as of record over 50 percent of the  
16 common stock of Dangdang. So, for us, the New York, the  
17 privacy of New York is important because you have purposeful  
18 availables of the New York Stock market and the New York  
19 investor base.

20 But then when people decide oh, wait it's not working  
21 out for me very much, they just don't like the New York  
22 judiciary, the accountability. So we think that the U.S.  
23 securities laws, as well as New York State law which applies,  
24 we will argue to the -- we feel quite strong about it,  
25 actually, to the common law negligent misrepresentation claim.



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1 And as well if it does turn out that it is a Cayman law as --  
2 claim, we think there is still the interest there. And you  
3 would be way back in the line of judges in this court, in New  
4 York State court who have had to do that because the use of  
5 Cayman as an offshore site is of certain incorporation is  
6 common place in financial services industry and corporations.  
7 So, it would not be a unique situation.

8 THE COURT: Sir, do you or your client have any  
9 knowledge or involvement in the parallel action that is  
10 currently going on in the Grand Court of Cayman Island?

11 MR. LIEBERMAN: Our clients are not involved in that  
12 action. We wouldn't call it a "parallel action".

13 THE COURT: You'd call it another action.

14 MR. LIEBERMAN: Yes, as to fair value. Look, that is  
15 an appraisal petition where people are not alleging claims of  
16 securities law violation. People are not raising claims of  
17 negligent misrepresentation, nor are they even challenging  
18 Cayman claims of breach of fiduciary duty. They're simply  
19 asking for their shares to be valued by a court using  
20 traditional methods of valuation as the centers from a  
21 transaction. So, it doesn't have a lot in common.

22 One unique thing about the other action is it was  
23 filed 19 days after our action. And it was filed not by  
24 plaintiffs. It was file as a matter of Cayman procedure by  
25 defendant Dangdang. Dangdang filed it. For all we know

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1 Dangdang was willing to negotiate with the dissenters and might  
2 not have brought that case at all. Could have negotiated and  
3 offered them a fair price. But having seen our action, they  
4 decide oh, let's create a forum shopping opportunity by 19 days  
5 after our claim filing an appraisal action overseas.

6 So, from our perspective, we don't view this at all as  
7 us coming here and piggybacking on something else going on. We  
8 have different claims. We have more substantive claims. In  
9 fact, what they usually call a claim like this that goes after  
10 claims as to statements made and fiduciary duty issues and  
11 negligent misrepresentations that's usually called a plenary  
12 proceeding applying to the entire matter where the appraisal  
13 petition is much narrower.

14 So, from our perspective we defer to that. We're  
15 first filed. We're also the one bringing larger claims and we  
16 have a much larger class of people. And there are millions of  
17 ADR shares out there over, over ten million ADR shares and  
18 there's a large class of people who got squeezed out here. I  
19 understand they are saying, we're a Chinese company that  
20 registered in Cayman but they came to the New York Stock  
21 exchange and we're looking to go enforce the U.S. securities  
22 laws.

23 THE COURT: Okay. Thank you very much.

24 Ms. Rudzin, let me hear from you. I am aware of the  
25 Poseiden case that was mentioned by counsel and I'm aware of

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1 Judge Nathan's opinion in the Holtzman matter. I think it's a  
2 2015 decision. And while I know it's sort of an on the one  
3 hand, on the other hand, on the other, other hand situation  
4 where it is the selection of the plaintiff that the case be  
5 here, I appreciate that the plaintiff is in a representative  
6 capacity but quite differently from the Holtzman case where the  
7 plaintiff was an Ohio resident, we have a New York resident who  
8 is our punitive class plaintiff. So, why shouldn't I give  
9 deference to this plaintiff's decision to bring the case here?

10 MS. RUDZIN: First of all, just so the record is  
11 clear, I represent the defendants that prevailed in the  
12 Holtzman case. So, I actually know that quite well.

13 THE COURT: All right. The answer is that we could  
14 cite or put these on the motion numerous cases where American  
15 plaintiffs including domiciled in New York their cases are  
16 still subject to form non convenience doctrine. Being a New  
17 York respondent is not the be all and end all. And I found it  
18 curious that Mr. Lieberman kept saying we have 400,000 shares.  
19 We have the biggest loss. When he said that he meant the  
20 French hedge fund. Mr. Fasano only had a few thousands shares.  
21 So, their lead plaintiff application is based on we are the  
22 biggest shareholder. And by that they mean the French hedge  
23 fund.

24 But even so, being an American plaintiff or being a  
25 New York plaintiff is not enough. There's less deference when

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1 the plaintiff is suing in a representative capacity and it's  
2 just one factor in the test.

3 THE COURT: Oh, I know. We'll talk about the others.  
4 I mean I believe that your adversaries have argued that the  
5 Cayman Island is a less adequate form because of the absence of  
6 contingent fee arrangements, the absence of jury trials in most  
7 cases and the substitute service issue.

8 On the contingent fee arrangement counsel will forgive  
9 me if I say that's not my biggest concern in this case. And I  
10 also believe the Cayman Island has a fee shifting or sort of  
11 English shifting. So, I am concerned but that can't be my only  
12 decision.

13 But the jury trial means something and the U.S.  
14 securities laws which I am told are driving this particular  
15 litigation must mean something. So why oughtn't it be here?

16 MS. RUDZIN: First of all, I haven't thought of this  
17 in a while, but a -- of fiduciary duties clients do not always  
18 get a jury trial. I'm not making an argument if that's the  
19 case here. I am just thinking it through. So that potentially  
20 not a dish distinguishing feature at all.

21 Cayman Islands is one of the few jurisdiction that has  
22 been repeatedly held to be an adequate alternative forum, so  
23 jury trials are not allowed there. I don't know off the top of  
24 my head. That can't be what makes it an alternative forum  
25 because it's been repeatedly held to be an adequate alternative

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1 forum. And a securities claim, first of all, their security  
2 claim is not a 10b-5 claim. It's under 1383 and the court's --

3 THE COURT: Why don't you just restart that argument  
4 please because, obviously, it's important to you so I want to  
5 hear it.

6 (Pause)

7 MS. RUDZIN: The court claim is not the driving claim  
8 in this -- It is brought under Rule 1383 and numerous courts,  
9 there are cases going both ways that numerous courts have held  
10 there's no right of action under that rule. So it's not even  
11 clear that that's a claim at all. But Mr. Lieberman just stood  
12 up and said that their 13e-3 claim is based on a false  
13 statement regarding conflict of counsel. Meaning, the Cayman  
14 counsel that serves as counsel to the special committee.

15 Of course, whether they had a conflict that should  
16 have been disclosed is a question of Cayman law. So even to  
17 the extent that's a security claim, it's based on Cayman  
18 Islands' a law. And it's particularly interesting that their  
19 complaint pleads that the transaction statement disclosed all  
20 of the facts about the Cayman Islands' relationships, the fact  
21 that the law firm had previously represented the company and  
22 was now representing a special committee, that was disclosed.

23 So the only disclosure claim is that the transaction  
24 statement did not use the word "conflict", did not say make  
25 the -- judgment that the previous representation meant they had

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1 a conflict. And that question, I don't think it's a disclosure  
2 claim at all because I think if you give investors the facts  
3 you don't have to give them adjectives on top of the facts.  
4 But whether that's a problem is, obviously, a question of  
5 Cayman Islands law because Cayman Islands counsel are governed  
6 by Cayman Island law

7 THE COURT: But to your earlier point about whether or  
8 not this particular provision is a private right of action, it  
9 sounds like you've already got in your mind the 12(b)(6) motion  
10 you wish to raise. So, we're here. Why not just bring it  
11 here?

12 MS. RUDZIN: Because I don't think -- well, given that  
13 most of the claims are governed by Cayman Island law and I  
14 wasn't sure where Mr. Lieberman was coming out on that, I think  
15 it's pretty well settled in -- internal affairs applies to  
16 breach of fiduciary duties claim. So that's Cayman Island law.  
17 That should be decided by a Cayman Island judge. Yes, we can  
18 bring in an expert and prove it and we've got a Cayman Islands  
19 expert we can put on in sort of your motion. But we think the  
20 form non motion should come first, not because it's sort of  
21 just the right motion to bring now, but also because to the  
22 earlier point about lead plaintiff and things if they amend  
23 their complaint, has then potentially another motion to  
24 dismiss. And we just think the case shouldn't be in New York  
25 at all. And all of these proceedings about lead plaintiff and

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1 further amended complaints, that's the second question.

2 The first question is, does the case belong in New  
3 York at all? So that's why it seemed like a preliminary  
4 motion. If you're asking us to bring all our arguments now to  
5 do forum non and substantively 12(b)(6) we will need a few more  
6 days.

7 THE COURT: I'm not sure I am. I just did want to  
8 understand that because and perhaps, it's my own enlightened  
9 sense of this court the whole complex, not me personally. But  
10 I would think we'd be able to decide Cayman Island issues.

11 What else would you like me to know in connection with  
12 the motion that you'd wish to bring?

13 MS. RUDZIN: Well, I found the cases that plaintiff  
14 cited in their letter interesting because the parties seem to  
15 be just talking past each other. Several of the cases they  
16 cited, they're 10b-5 cases. They're case that arise out of  
17 filings that were made in this country, just not this case.  
18 The claims here arise out of a merger.

19 And more important in all those cases, Judge Cote's  
20 decision the company has the listed company was foreign but it  
21 had U.S. operations and U.S. subsidiaries. That is not the  
22 case here. There are no witnesses, no files, no nothing in the  
23 United States. The only thing in the United States was  
24 Mr. Fasano. But the lead plaintiff application is really on  
25 behalf of a French hedge fund since they are the ones that own

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1 the four hundred thousand shares. So, I think if you look at  
2 sort of the factors, I'm happy to go over more of them with  
3 you. I think we more than have a good faith basis to bring  
4 this motion

5 THE COURT: I'm not saying you don't. I'm just  
6 wondering whether ultimately it will be successful. Let me ask  
7 you something just while I have you standing. There's been an  
8 application from your adversary regarding service. Is your law  
9 firm willing to accept service on behalf of these defendants  
10 named in the plaintiff's letter?

11 MS. RUDZIN: We are not authorized to do that. We  
12 haven't been engaged by them.

13 THE COURT: OK. And so you really cannot speak to the  
14 issue of substitute service or alternate service methods.

15 MS. RUDZIN: Correct. I will point out again I read  
16 the cases they cite in their letter. And all of them seem to  
17 say the plaintiffs need to make a showing that they've actually  
18 tried to conduct service. And of course it has to be necessary  
19 to the action. So, again, in terms of the timing here, if the  
20 action doesn't belong in New York we succeed in persuading you  
21 that our form non convenience argument is correct, the kind of  
22 service issue stuff is all moot. I think they're all subject  
23 to service. So to me that just seems premature to talk about  
24 the substitute service now.

25 THE COURT: Mr. Lieberman, may I hear from you, sir,



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1 in response.

2 MR. LIEBERMAN: Yes, your Honor. I think you just  
3 stepped onto, stumbled onto, went right for the nub of the  
4 issue actually, which is that they want to -- you've asked them  
5 why not bring all the merits? And because they don't want  
6 American courts addressing any of the merits. They want to  
7 duck service and they want to duck accountability and just have  
8 this go to the Cayman Islands.

9 THE COURT: I thought Ms. Rudzin said to me if she  
10 were fortunate enough to convince me to grant her motion that  
11 there wouldn't be a service issue that you are now having.

12 MR. LIEBERMAN: Granted what?

13 THE COURT: Well, if the motion to dismiss is based on  
14 forum non convenience grounds were to be granted and you were  
15 to bring your case in the Cayman, I think what she's saying is  
16 the service issues that you've raised to my attention in this  
17 letter would not be issues because they're in the Caymans. Am  
18 I misunderstanding that?

19 MR. LIEBERMAN: Well, she can clarify. I did not  
20 interpret her to saying that and I'll tell you why because  
21 cause the Cayman Islands are not where the defendants are  
22 situated. They've retreated to China. And in fact there is no  
23 method or alternative substance or service of process in China.  
24 She knows that. That's why she is here on behalf the entities.

25 And it's very curious to hear her say that because the

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1 entities here, we have control -- we've got controlled entity  
2 here. Dangdang has one person, Guoqing Li, who is the first  
3 defendant on the caption, he owns over 70 percent of the stock  
4 of Dangdang, and I mean the voting control of Dangdang. He  
5 formed a controlling group. He is controlling the entity. He  
6 actually is the one behind the decisions made as to Dangdang.  
7 He, through that entity, has retained the O'Melveny firm. But  
8 he is saying, no, that can't work for service for me.

9 Similarly, his wife was the chairman of the firm. She  
10 was chairman of Dangdang. She also has as an executive or as  
11 someone who is involved with the company and is the wife of the  
12 CEO has involvement in that company.

13 Similarly, Mr. Xou owns First Profit. And he is the  
14 person on whose behalf, she's appearing on First Profit but she  
15 won't accept service for the man behind it. What they want to  
16 do is hide in China and have no exposure to liability. She did  
17 not say in her letter that there would be service of all of the  
18 defendants in Cayman. I don't think that would be happen.  
19 They'd be subject to a similar without the opportunity to  
20 substitute service. They have to go through the Hague and  
21 they'd have to drop it off at the Ministry of Justice. Now we  
22 have done that.

23 THE COURT: Sir, slow down for the court reporter and  
24 judge. Thank you.

25 MR. LIEBERMAN: I was rushing to say I have been

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1     tasking Mr. Hutman with doing the leg work on, in fact getting  
2     this dropped, getting service dropped off at Ministry of  
3     Justice. We actually have gotten translations of the  
4     complaint. We've dropped off the summons, complaint and  
5     translation of complaint at Chinese Ministry of Justice.

6             THE COURT: When was that, sir?

7             MR. LIEBERMAN: I believe January, might have been  
8     January 17 but I can get you the exact date. It was in  
9     January.

10            MR. HUTMAN: Mid to late January.

11            MR. LIEBERMAN: And we have done it. But one thing  
12     that happens when you drop things off at the Chinese Ministry  
13     of Justice, sometimes it get's carried through, sometimes it's  
14     not. There are vagaries of the Chinese system that sometimes  
15     prevent service from happening. Sometimes it happens in a  
16     matter of months, but we have provided that.

17            I'll tell you something else we've done. In the  
18     merger agreement, there's a provision of notices as to the  
19     merger, and they named the Sherman and Sterling firm "Ms. Tang"  
20     and they named the Skadden firm "Ms. Xou" as persons who would  
21     be there to take notices as to the merger for the Sherman firm  
22     would take it as at special committee and the Skadden firm  
23     would take it as to the Byers group.

24            We actually have provided waiver of service documents  
25     to them and we've provided the summons and complaint to them by

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1 e-mail. And they said, no, I'm not authorized to accept  
2 service. The phrase "I'm not authorized to accept service"  
3 will be heard again and again and again. But that's why we  
4 pointed to the GLG case, technology's case and we pointed to  
5 also the case of Stream S-I-C-A-V v. Wang as cases where  
6 substitute service was ordered through counsel for the employer  
7 for high level employees.

8 THE COURT: But, sir, when I have had this issue I've  
9 allowed substitute service where there were deficiencies in  
10 locating or finding an address for a individual which meant  
11 that the Hague service would be ineffectual no matter how long  
12 we waited here. However, don't I have to at least give it a  
13 chance to succeed before I find alternative service. I mean,  
14 it's not even been a month since these submissions were made  
15 with the Ministry Of justice. So, I'm wondering if this is not  
16 perhaps premature.

17 MR. LIEBERMAN: Your Honor, I think the answer to that  
18 is all we want is the efficient administration of justice here.  
19 And I'm thinking from scheduling stand --

20 THE COURT: Sir, I'm going to stop you there. We all  
21 want the efficient administration of justice but the Hague  
22 Convention exists because of other important international  
23 relations issues. And I'm just wondering, I don't want you to  
24 ask me to just step on the toes of the Chinese Ministry of  
25 Justice just because you have not submitted your thing until

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1 the 17th of January or thereabouts. Please continue.

2 MR. LIEBERMAN: Look, I understood, and that is part  
3 of the efficient administration of justice, your Honor, that  
4 you are saying and I hear your point.

5 I think what I'm concerned about is seriatim or  
6 motions to dismiss coming. I think -- look, people have dealt  
7 with service through China and it sometimes take a while. So,  
8 yes, if your Honor thinks that a certain amount of time, I  
9 think that is definitely a prudent exercise of discretion. I  
10 think what you have here are parties who do want to move  
11 forward and litigate the matter. So, I would ask the Court  
12 keep both of those goals in mind here because we are almost a  
13 month into the Ministry of Justice service area.

14 And look, Ms. Rudzin is the first one to submit a  
15 letter here. She wanted to bring a motion and she is right  
16 here.

17 THE COURT: But she wanted to bring a motion on behalf  
18 of the client she's authorized to represent. You're losing me  
19 on this argument, sir.

20 MR. HUTMAN: I would just like one moment with  
21 Mr. Lieberman.

22 MR. LIEBERMAN: Please do.

23 (Pause)

24 THE COURT: Please continue, sir.

25 MR. LIEBERMAN: Look, I understand -- I think our

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1 point is that underlying the Hague Convention is also to make  
2 sure that foreign nationals have notice and have an opportunity  
3 to discover service and are not subject to default judgments  
4 because they didn't have adequate notice of the filing of an  
5 action.

6 I think as to the executives of Dangdang, I think  
7 Mr. Chen, Mr. Kan, Guoqing Li, Mr. Xou and as well as Peggy  
8 YuYu, I believe there can't be any real concern here that they  
9 don't have notice of the action. And I mean when you are  
10 saying stepping on the toes, you'd be stepping on their toes  
11 just by subjecting them to a U.S. court.

12 But they know exactly that this action is pending.  
13 There's been nationwide publication about this. They have  
14 counsel who set up for their entity. So, I think that I  
15 understand the desire to have the Hague Convention and give it  
16 time. I'm not saying we're taking an absolute position on this  
17 cause I understand the Court's concern. I would just say going  
18 back to first principles of notice and what's underlying the  
19 Hague Convention, I think substitute service at some time  
20 shortly would not frustrate the purposes behind the Hague  
21 Convention.

22 THE COURT: Good. Thank you.

23 Ms. Rudzin, I want to hear you in response, please.  
24 If you could accept on behalf of the company why can you not  
25 accept on behalf of the individuals who are affiliated with

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1 certain of those companies?

2 MS. RUDZIN: I don't think that I have an obligation  
3 to accept service on behalf of individual employees or  
4 controlling shareholders of corporations. I think that  
5 there's -- and it's the corporate forum and generally the Court  
6 respects it. I'm not going to stand up here and representative  
7 I've never spoken to any of these people.

8 THE COURT: I'd rather you not speak falsely to me.  
9 That is fine.

10 Let me ask the question a little bit differently.  
11 Recognizing that the corporate forum is a thing to be respected  
12 as is the Hague Convention, may I ask you, is Mr. Lieberman  
13 correct to the best of your knowledge that the individuals as  
14 to whom he seeks service have some awareness of this  
15 litigation?

16 MS. RUDZIN: I can say that I'm sure about the top  
17 couple people, the first people.

18 THE COURT: Mr. Li, Ms. Yuyu?

19 MS. RUDZIN: Yes. I don't actually know about the  
20 others. I think some of these were directors of the company  
21 before it went private. So, they are not affiliated with the  
22 company at all now. So I don't think -- I don't actually now.  
23 I think it's sort of funny that Mr. Lieberman says that  
24 publication somehow gave them notice in the China. So, I don't  
25 know.

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1 THE COURT: They may have a Google newsletter. I do  
2 know. Did I misperceive what you were saying earlier? If per  
3 chance this case were to find its way in the Cayman Islands,  
4 are you telling me these folks, some of whom you don't  
5 represent, are all going to be onboard for being defendants in  
6 the Cayman Islands?

7 MS. RUDZIN: No.

8 THE COURT: I want to understand a little bit more  
9 than what you meant to say to me earlier.

10 MS. RUDZIN: Yes. I'm sorry. I was speaking about  
11 the defendants here could all be served in Caymans. I don't  
12 know if the Caymans has a procedure like most U.S. states have  
13 where executives of a corporation incorporated there can be  
14 served in that jurisdiction. I just don't know off the top of  
15 my head.

16 THE COURT: What you were saying to me is the various  
17 entities who have appeared here can appear there?

18 MS. RUDZIN: Yes.

19 THE COURT: But there weren't service issues as to  
20 them, the service issue as everybody else. I don't think you  
21 meant to but I think you gave me a false impression because I  
22 thought that that mattered. If it turns out they are in the  
23 same pickle service-wise if this case is in the Cayman Islands  
24 as it is here, they've advanced nothing. That's not a basis  
25 for them to accede to your desire to have it transferred to the



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1 Cayman Island.

2 MS. RUDZIN: That's fair enough. Sorry if I gave that  
3 you false impression. I think I was just thinking in my head.  
4 Ordinarily, I don't know Cayman Islands law but ordinarily you  
5 can serve the directors and executives in the state where it's  
6 incorporated. Usually, there's a state statute that says if you  
7 agreed to be the director of that Delaware company you agreed  
8 to be subject to service on -- I don't know if it's in the  
9 Cayman.

10 THE COURT: All right. Mr. Lieberman, I have  
11 conferences like this for two reasons. One of them is to see  
12 whether if and as appropriate I can persuade a party. I  
13 suspect I'm not going to be able to do that here. So, the next  
14 question is given the motion that is contemplated, does your  
15 client want an opportunity to replead anything? This is not a  
16 12(b)(6) motion where those things are much more common. It  
17 would be a different basis. But I did want to give you the  
18 opportunity for your clients to replead if you wished them to  
19 do so.

20 MR. LIEBERMAN: As to the bases that have been set  
21 forth in her motion, at this point, I don't have -- I'm not  
22 looking to replead.

23 I will note something though that we are contemplating  
24 however, which is that form non convenience motions usually do  
25 involve some limited discovery into the context with the state.

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1 Just from looking at some of the -- even, and there have been  
2 several cases where there's been a stay. It's not a PSLRA stay  
3 but the Court issued stay based on ordinary factors that  
4 usually go into it and courts have lifted the stay for that  
5 limited reason. It's possible based on what is ultimately put  
6 in the pleadings that we may ask for some very limited  
7 discovery into the context that people have with the United  
8 States and New York in particular and I'll give you an example.

9 We, in going through some the Dangdang public filings  
10 but we have to go back to 2010 when we first did the ADR  
11 listing, we found a head in underwriting agreement. And in the  
12 underwriting agreement with New York banks they said that they  
13 submit to the non exclusive jurisdiction of federal and state  
14 courts Dangdang said, as well as the telling --

15 THE COURT: This is in your letter to me, sir?

16 MR. LIEBERMAN: Yes. So they waived form nonissues  
17 the Cohen entity and the Dang entity. They waived form  
18 nonissues and they agreed to the New York form or disputes  
19 under the underwriting agreement.

20 As to the ADR depository agreement with the Bank of  
21 New York Mellon, they had a similar choice of law and choice of  
22 forum provision. And in the merger agreement itself there is a  
23 choice of law provision that actually chooses both New York law  
24 and Cayman law. They sort of carve out. For the laws I like  
25 I'm going to choose New York Law and for the laws I don't like

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1 in the U.S. I am going to choose Cayman law.

2 THE COURT: But all parties to the agreement agreed to  
3 that, do they not?

4 MR. LIEBERMAN: All parties to the agreement did agree  
5 yes. And my point about the agreement was, you know it was  
6 sauce for the goose when it suited their purposes and now here  
7 accountability is coming and now they are saying "no", New York  
8 is very inconvenient. It's the worst place we could be. So we  
9 may want to look for other instances of that to supplement on  
10 point. And there have been cases where a stay has been  
11 involved and I really don't know without having more beyond the  
12 motion.

13 THE COURT: Slow down, sir.

14 MR. LIEBERMAN: I've seen the Holtzman case by judge  
15 Nathan. And as your Honor pointed out, there are some  
16 differences including that was solely Cayman claims. In that  
17 case it was also a citizen of Ohio in that case. And you know  
18 I've seen that but I haven't seen all authority. They are  
19 going to put forward or all factors.

20 And I would draw the Court's attention to -- I mean,  
21 there was a case Base Metal Trading SA v. Russian Aluminum,  
22 2002 WL 987 257, was an instance where the Southern District of  
23 New York and Magistrate Judge Maas, albeit, authorized some  
24 limited discovery despite having a previously instituted stay.  
25 So, there may be some requests for a limited discovery.

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1 I understand the PSLRA standards there. However, we  
2 believe that it's a little hard to read into the future. We  
3 would make such a motion if we felt that the circumstances were  
4 met and they were presented squarely by the motion. So that's  
5 one issue that could come up.

6 THE COURT: But how does that impact the schedule that  
7 I may be setting regarding the briefing of this motion? Did I  
8 understand that you were asking for 45 days to respond?

9 MR. LIEBERMAN: It's what the party agreed on.

10 THE COURT: So the answer is "yes"?

11 MR. LIEBERMAN: The answer is "yes" in the first  
12 instance, yes. And that is what we're asking for. There are  
13 27 days for reply.

14 THE COURT: Yeah, I know. I wasn't thrilled with that  
15 either. Is it your contemplation, sir, that any of the  
16 discovery that you've just been suggesting to me might be  
17 necessary would be done in that 45 day period?

18 MR. LIEBERMAN: I think it may. I mean, look, we'll  
19 with we'll be able to get our discovery requests out within  
20 five business days, OK? We'll able to get maybe even four.  
21 We'll know what we need upon reading the motion. Ms. Rudzin is  
22 a capable counsel who writes clearly and so we'll know pretty  
23 clearly what we are going to need if we need it and then  
24 there's a question of how quickly we can get anything back.

25 Look, I'm not looking to do any of the blunder bus or

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1 full-scale discovery into the underlying merits. It would just  
2 be as to the context because there are some people for whom  
3 some of these entities where we could find out more. These are  
4 entities that are setup. One is BDI. One is in Cayman. And  
5 what you often find is that one way or another there are some  
6 major dealings with major financial centers. So, it is  
7 possible that there could be some discovery that's appropriate  
8 in response to your motion

9 THE COURT: All right. The things that you were just  
10 talking to me about sounded like you were able to access them  
11 through repository republic documents and you didn't need to  
12 actually reach out to --

13 MR. LIEBERMAN: As to the Dang Corporation which is  
14 the main company, I think there is much that I'm able to get  
15 from public filings because they haven't been public filings  
16 since 2010.

17 Dang's parent, as well as the Cohen entity and the  
18 Signs and Culture Limited, that can be an issue.

19 And if other defendants come in and make similar  
20 motions, that could be an issue because one of the special --  
21 she mentioned opposing -- counsel mentioned the special,  
22 certain special committee members. There are three defendants  
23 who are former directors who are on the special committee that  
24 vetted deal in a purportedly independent fashion. One of them  
25 is, her name is Ruby Wang Lu. And Ms. Lu is currently a

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1 director of Yum Brands China Holding Limited which has its  
2 principle place of business in Plano, Texas and which also has  
3 an agent or service of process that's in Delaware. And so we  
4 already actually have dropped off the service with her there  
5 because she's actively conducting business in the United  
6 States.

7 And so should Ms. Lu appear at some point and argue  
8 forum non we'll point out that she worked at Goldman Sacks in  
9 the United States. She went to John Johns Hopkins. She sat on  
10 the boards of at least four companies that are listed in the  
11 United States. And those are the sorts of things that I think  
12 put a little flesh on the bones of what we're trying to say  
13 that it's reasonable and to expect that one who deals that much  
14 with the United States would be hailed into court here even as  
15 a matter of discretion under the forum non convenience.

16 THE COURT: OK. Thank you.

17 Ms. Rudzin, your letter is the one that contains the  
18 schedule. You are probably perceiving I am not thrilled with  
19 the schedule but I am at base a reasonable judge. I will  
20 listen to reason as to why 45 days and 27 days are needed.

21 MS. RUDZIN: OK. Well, I am going to ask you to be a  
22 little more reasonable first because we said we were going to  
23 file in five days.

24 THE COURT: I thought it was five days after  
25 plaintiff's counsel being appointed lead counsel. Remember,

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1 that's what you are telling me.

2 MS. RUDZIN: That's fine. I'm sorry. I was thinking  
3 five days as I mentioned, we're going to be putting in a  
4 declaration from the Cayman law expert and we just with  
5 schedules and stuff, I just didn't want to have to do it early  
6 next week but if we're talking about March 8, that's fine.

7 THE COURT: Is that not what you suggested to me in  
8 your letter of January 27? I'm looking at page two and look,  
9 it's been a very long day for me. I've had a trial and I may  
10 be misreading but I thought it was five days of -- oh, I see.

11 MS. RUDZIN: I wasn't sure how the earlier discussion  
12 we started with interacted with this.

13 THE COURT: Where is the "or"? Then five days later  
14 of plaintiff counsel -- and defendant being granted permission  
15 to file their motion to dismiss on forum non convenience  
16 grounds. Should is that have been an "or"?

17 MS. RUDZIN: Yes.

18 THE COURT: Then I feel so much better. As much as I  
19 want the efficient administration you justice, I also want to  
20 have a little more time before plaintiff's counsel renews their  
21 application for service on a substitute or alternate basis.  
22 So, let's make it five days after plaintiff's counsel is  
23 appointed lead counsel if that is indeed what happens and we  
24 expect it will.

25 And then let's talk to me about the 45 days and the 27

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1 days and maybe it's scheduling of parties long planned  
2 vacations who knows but --

3 MS. RUDZIN: Your Honor, Mr. Lieberman asked for 45  
4 days and I said "OK".

5 THE COURT: But then you asked for 27?

6 MS. RUDZIN: Yes, because originally I proposed 30 and  
7 20 and when he said 45, I said give me a little more. It was  
8 just negotiations. I'm not wedded to either number.

9 THE COURT: You can be wedded but is not 27 kind of a  
10 random number?

11 MS. RUDZIN: Yes, because it was a little back and  
12 forth.

13 THE COURT: Charming. OK.

14 Mr. Lieberman, talk to me about the 45 days.

15 MR. LIEBERMAN: Your Honor, I think where 45 days came  
16 from is that we weren't sure when the later of the two dates  
17 with the five days would come up and I was operating without  
18 knowing exactly when I would be briefing it. So, I just wasn't  
19 sure.

20 I have another matter that is going to summary  
21 judgment with cross motions for summary judgment in March so it  
22 was a protected matter.

23 Also, somewhere in there is the Jewish holiday of  
24 Passover which is going to be I think on the 11th through the  
25 19th. It's something which impacts all three of us and maybe



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1 Ms. Rudzin as well and so I was just thinking of that that may  
2 get involved there. And so maybe when you net out the time I  
3 might be spending on another motion and the holiday, that would  
4 come close to 30 days.

5 THE COURT: OK. So let's start with this. If the  
6 filing day for their motion which I will not be able to  
7 persuade her not to file even though you should see my  
8 skepticism. I'm not completely, if I thought it had no chance  
9 I would be honest with you and tell you had it had no chance.  
10 I don't see that. I'm just skeptical as I'm allowed to be.  
11 It's going to be sometime on or about the 13th of March if that  
12 is even a weekday. I am going to make it March 15th as the  
13 opening the date for the opening brief.

14 Counsel, tell me and be honest, do you need the 45  
15 days? Do you need 30 days? Do you need something between  
16 that?

17 MR. LIEBERMAN: I think I am going to say, I am going  
18 to ask for the 45 for this reason, for the days we were just  
19 talking about the right -- look, you can make an argument that  
20 all the real briefing gets done within a certain time period  
21 and part of the core time period could be right when Passover  
22 begins. I could tell you that could be something that impacts  
23 me. I think Passover starts on the 11th and that the days that  
24 are involved I observe it in a way in which I don't write or  
25 come to the office on the 11th or the 12th. So that would be

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1 two prime days. So I would ask for the time and then it is an  
2 eight-day festival, admittedly, with four days that have the  
3 primary restrictions on me. So I would still ask for 45.

4 THE COURT: OK. Wow. You could have just said, yes,  
5 I need more time.

6 All right. March 15th is the day for the opening  
7 brief, April 28 for the opposition, May 17 for the reply.

8 Does that work for both sides?

9 MS. RUDZIN: Yes, thank you.

10 MR. LIEBERMAN: Yes, your Honor.

11 THE COURT: OK. Mr. Lieberman, because you are  
12 standing, could you please arrange to get a transcript of this  
13 conference. Just order it in the ordinary course because by  
14 the time all briefing is done I'll turn back to it and see what  
15 it is we were talking about.

16 MR. LIEBERMAN: Yes, your Honor.

17 THE COURT: Also, sir, is there anything we should be  
18 discussing this afternoon?

19 MR. HUTMAN: Your Honor, may we have one moment?

20 THE COURT: Ms. Rudzin, is there anything else we  
21 should be talking about today?

22 MS. RUDZIN: No. I'm good. Thank you.

23 THE COURT: All right. Thank you very much.

24 (Pause)

25 MR. LIEBERMAN: Your Honor, I guess the one thing I'd

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1 like to ask your preferences on are, we have the schedule set  
2 for the motion. We also talked today about motion for  
3 substitute of service. How would you like that to be  
4 integrated into this, if at all?

5 THE COURT: You can add something that's not too long  
6 to your April 28 briefing if by April 28 nothing has happened.

7 MR. LIEBERMAN: Correct.

8 THE COURT: I don't think you are going to need more  
9 than about five or six pages to tell me why because there just  
10 aren't that many. I don't think it's an extensive body of law  
11 and then it can be responded to and if counsel wishes to  
12 respond to it or not.

13 MR. LIEBERMAN: All right. And so --

14 THE COURT: That means you have 30 pages rather than  
15 25. So, 25, 30, 10.

16 MS. RUDZIN: 15.

17 THE COURT: Fine. Fine. OK. All resolved.

18 MR. LIEBERMAN: All resolve.

19 THE COURT: Mr. Hutman gets to talk next time. If  
20 he's here, he gets to speak. You know that, right? They  
21 didn't bring many O'Melveny minions to talk but he gets to  
22 speak next time.

23 Thank you all very much for your patience. Have a  
24 great afternoon.

25 (Adjourned)